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NTSB Order No. EA-4213

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 8th day of July, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. NICHOLAS J. WERVE, Respondent.	Docket SE-12641

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick J. Geraghty, issued on January 7, 1993, following an evidentiary hearing.[1] The law judge affirmed an order (complaint) of the Administrator suspending respondent's airline transport pilot certificate, on finding that respondent had violated 14 C.F.R. 91.7(a), 121.605, and

[1]The initial decision, an excerpt from the hearing transcript, is attached.

91.13(a).[2] We grant the appeal and dismiss the complaint.[3]

Respondent was pilot in command of TWA Flight 73 from Moline, IL to St. Louis, MO, on January 28, 1991. Following the aircraft's flight into Moline the day before, the prior captain had made an entry in the aircraft's log (apparently on the advice of a flight attendant, see Tr. at 151) that read: "Left front cabin door can not be opened from inside."

When respondent arrived at the aircraft, at approximately 6 A.M. the next morning, he was told that there was a write-up, but that no one would be out to check the aircraft until after 8:00 A.M. Respondent read the entry and testified that he opened and closed the door with no problem more than 2 dozen times. Tr. at 134. He examined the entire door and its frame and saw no defect. Id. He had his flight crew (three cabin attendants and copilot) and a ground crewmember test the door as well. Tr. at 153. Each opened it every time and did so relatively easily.[4]

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[2]§ 91.7(a) provides that "No person may operate a civil aircraft unless it is in an airworthy condition."

§ 121.605 provides that "No person may dispatch or release an airplane unless it is airworthy and is equipped as prescribed in § 121.303."

§ 91.13(a) reads: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[3]The law judge reduced the suspension proposed by the Administrator from 180 to 100 days. The Administrator did not appeal this reduction.

[4]A written statement from one of the cabin attendants reads, in part: "What I remember was that the door indeed did open O.K. It was that it took alittle [sic] extra effort to get the handle out of the closed position, but after that, it was a smooth

The parties stipulated (Tr. at 156) that all the crew thought the door worked fine, and the copilot was also satisfied that the aircraft was airworthy.

At the hearing, respondent acknowledged that he knew he could not defer airworthiness items and that he could not operate the aircraft with an "open" entry in the log. Tr. at 135-136. He also knew that the TWA Maintenance Coordinator could defer some maintenance items and that mechanics could write them off. Id. at 135. Because he also knew that doors often stick, which in his mind was different from broken doors, he sought advice on how to proceed from the TWA Kansas City Maintenance Coordinator on duty at the time, Larry Kent. He reported the examination and testing of the door, and Mr. Kent advised him to defer the item pending arrival in St. Louis, also providing him exact language to insert in the log, which he did.[5] Respondent testified that, had the door stuck even once when he was trying it, he would not have made the flight. Tr. at 139.

At some point after respondent spoke to Mr. Kent, a man appeared in or near the cockpit and said something to respondent to the effect that "I understand you have a stuck cabin door."

(..continued)
operation." Exhibit A-10, emphasis in original.

[5]It is not clear whether respondent knew, but Mr. Kent testified that, although the door had been written up, the prior crew had checked the door after the initial problem and said it again was operating normally. Tr. at 103. See also statement of Maintenance Coordinator McKay, on duty at the time of the prior flight's arrival, reproduced as Exhibit 2 to the Administrator's August 3, 1992 Answer in opposition to respondent's motion to dismiss.

This individual, a contract mechanic who had been called earlier to look at the door (TWA had no maintenance personnel at Moline), did not identify himself, and respondent testified that he did not assume the man was a mechanic. Respondent told him that the problem had been resolved.

The flight departed on time and, on arrival at St. Louis, there was no difficulty opening the door. It took three mechanics approximately 1 hour to reproduce any type of difficulty. Tr. at 122. Only after numerous cycles of opening and closing the door, and two pressurizations of the cabin, did a defect appear. The door opened 4-6" and then jammed. Id. at 122, 124. One of the mechanics who worked on the door testified that "it just happened to catch that one time." Tr. at 125. He stated that, after it caught that first time, if the door was opened slowly, it would catch every time, but he could not remember if, after the first time, the door was closed entirely and then reopened. Tr. at 125-126. The maintenance entry in the log reads "Found outside door handle catching on stainless steel rub strip. Trimmed strip + handle. Door ops ck normal." Exhibit A-2.

Respondent's primary defense is that the aircraft was airworthy, i.e., that the door was working properly and that the prior crew's entry was mistaken. Although counsel for the Administrator believed that it was his burden to prove that the aircraft was not airworthy (Tr. at 25), the law judge made clear his disagreement a number of times during the hearing. See,

e.g., Tr. at 89 (the issue is not "whether or not the door actually worked or did not work").[6] Despite his comments on the subject, the law judge concluded that the aircraft was unairworthy because the door "does not open each and every time smoothly." Tr. at 177. We disagree with the law judge's analysis of the evidence on this issue.[7]

Airworthiness, and compliance with §§ 91.7(a) and 121.605, required the door to be "reliably" operable from the inside. Exhibit A-6. The Administrator's evidence consists of prior log entries indicating a problem with the door, including the January 27, 1991 entry, and the fact of the repair. (Captain Werve's allegedly inadequate response to that last entry is irrelevant to the §§ 91.7(a) and 121.605 charges if the Administrator does not first prove that the aircraft was unairworthy.) We cannot find that the Administrator has met his burden of proving unairworthiness by a preponderance of the evidence.

First, the prior entries constitute no proof that the aircraft was unairworthy when operated on January 28, 1991.

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[6]The law judge framed the issue as whether or not the procedures were followed to establish whether the aircraft was airworthy. Tr. at 179. But respondent was not charged with violating company procedures.

[7]In making factual findings, the Board is not bound by the law judge's findings. See, e.g., Administrator v. Wolf, NTSB Order EA-3450 (1991), and Administrator v. Schneider, 1 NTSB 1553 (1971). There are no credibility issues for which deferral to the law judge's findings would be appropriate. In light of our formulation of the issues, we agree with respondent that it was error for the law judge not to allow him to develop the record on the airworthiness issue.

Exhibit A-7, the list of prior discrepancies with the door, shows that each log entry was "cleared" by maintenance. Even the Administrator's witness, maintenance inspector Bunten, testified that, if an entry had been signed off legitimately, the aircraft would be presumed to be airworthy. Tr. at 86-87. There is no suggestion that the sign-offs were not legitimate. In any case, Mr. Bunten's testimony that prior maintenance history indicated progressively worse failure of the door is not supported in the record. And, even if respondent is held to knowledge of these prior events (and the Administrator did not address whether he knew or should have known of them), the maintenance history (Exhibit A-7) supports respondent's theory. The complaints citing difficulty opening this door were resolved by maintenance personnel either by simply lubricating the door and noting it was operating normally or by noting in the log that operations were normal.

The Administrator's case is further weakened by a letter in the record (see Exhibit A of respondent's motion to dismiss) from TWA to the Administrator's counsel indicating widespread reporting of door opening difficulties in DC-9s (listing pages of such reports), with maintenance's response the same as above -- lubrication, at most, with a comment that the door was operating normally. The letter reflects TWA's belief that these logged discrepancies, and the January 27th incident, reflected improper operating technique rather than physical defect, and TWA noted that it had even produced an instructional video to attempt to

remedy the problem.

Second, the repairs ultimately conducted on the aircraft are of little or no use in proving the door (and thus the aircraft) unairworthy, as they do not reliably confirm either that there was a problem with the door at the time respondent checked it or that, if there was a problem, it was the problem noted by the January 27 crew. It took extensive trials to produce any problem with the door, and when a problem "developed," it was not clearly the same problem as a door that would not open. The mechanic's log entry states only that the door was catching, not that it could not be opened from the inside, and his testimony confirmed that the problem the mechanics identified was one of a door that opened part way, not a door that could not be opened at all. The mechanical aspects of these two defects have not been shown to be the same. The mechanic's testimony, that when opened slowly the door was "catching," is considerably different even from the attendant's report that the door opened freely, with a little extra effort in initial turning of the handle.[8]

We are left, then, with the § 91.13(a) charge, which the Administrator stated, without argument from respondent (see Tr. at 34), was an independent rather than residual violation. The

[8]We would also note our general holdings, which the Administrator does not attempt to distinguish here, that not "every scratch, dent, 'pinhole' of corrosion, missing screw, or other defect, no matter how minor or where located on the aircraft, dictates the conclusion that the aircraft's design, constriction, or performance has been impaired by the defect to a degree that the aircraft no longer conforms to its type certificate." Administrator v. Calavaero, 5 NTSB 1099, 1101 (1986), clarified at 5 NTSB 1105 (1986).

preponderance of the evidence does not support a finding that respondent did not satisfy his duty of care in his response to the prior crew's entry. Respondent repeatedly tested the door and examined it. He had his crew test the door. No problem was found. In view of his other actions and testimony, we will not find respondent careless for, perhaps wrongly, checking with Mr. Kent and following his advice.[9] There was reason to believe that the prior crew's difficulty with the door had been eliminated.[10] The record, taken as a whole, also does not warrant a finding of carelessness based either on the Administrator's suggestion that respondent compromised safety (declining to await a mechanic's look at the door) out of a concern for an on-time departure or based on respondent's failure to pressurize the aircraft before he conducted his tests of the door.[11] Accordingly, we dismiss the complaint.[12]

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[9]As we read the exhibit excerpts from the manual, Mr. Kent had authority to defer maintenance items that did not implicate airworthiness and only when there was no on-site TWA or contract maintenance.

[10]Company procedure also required that the prior crew "red circle" discrepancies that were airworthiness items. Exhibit A-8 at page 4. This entry had not been red circled.

[11]As to the latter point, the Administrator does not demonstrate why respondent should have been expected to pressurize the cabin. Indeed, based on the door's satisfactory opening after two later pressurizations (one inflight and one by the mechanics) there is no indication that, had he done so, the door would not have opened.

[12]Respondent raises various procedural arguments in support of dismissal of the complaint. These arguments were made to the law judge, but his order denying them contains no reasoning. Although we need not reach these issues in view of our conclusion on the merits, we find none of them convincing. For example,

ACCORDINGLY, IT IS ORDERED THAT:

1. The initial decision is reversed; and

2. The Administrator's order is dismissed.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

(..continued)
contrary to his claims, we find no violation of our stale complaint rule in the Administrator's additions in his second order of suspension. (The Notice of Proposed Certificate Action (NOPCA) was issued on May 5, 1991, within the 6-month period specified in our rule, 49 C.F.R. 821.33. Following an informal conference, the Administrator issued an order of suspension on December 5, 1991. That order was withdrawn to consider new information respondent provided after the first conference, and a second conference was held on May 12, 1992. Unconvinced by respondent's defense, the Administrator reissued the order of suspension on June 8, 1992.) Respondent received satisfactory notice of the matters of concern to the Administrator in the NOPCA. The June order merely provided more of the Administrator's contemplated legal argument. In fact, respondent offers no indication of how he was adversely affected either at our hearing or FAA informal conference stages by the additions to the order. The process also does not violate the Administrative Procedure Act, 5 U.S.C. 551, et seq., by providing for FAA conduct of informal conferences and Board law judge conduct of the hearing. The informal conference is not the APA hearing at which evidence is received and an initial decision issued. Respondent apparently misperceives the relationship of the Board and the FAA prosecutors.